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CONSTITUTIONAL REVISION IN VIRGINIA

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By proclamation of the Convention (and not by popular vote) the revised Constitution of Virginia went into effect on the tenth day of July, 1902. Before that date, the government of Virginia, with a few amendments, was under the Constitution adopted in Reconstruction days and finally put into operation in 1870. The call for a convention which resulted in the new Constitution of 1902 came chiefly as the result of movements in the South of more than twenty years' duration for the modification of suffrage, Virginia not considering seriously any change until about 1899. When the question of a convention was submitted to the people in 1900, other matters than suffrage were assigned as reasons for a new Constitution, among them being greater economy in the administration of affairs and a better system of taxing corporate enterprises.

The new constitution made a number of changes in the executive departments. Before 1851, only the General Assembly was elected by popular vote, but after that date, the governor, the attorney-general, the lieutenant-governor, and even the judges were elected by the people. By the Underwood Constitution, the members of the general assembly, the governor, the lieutenant-governor and attorney-general were the only State officers elected by popular suffrage. The new constitution not only continued this but also provided for the popular election of such officers as the secretary of the commonwealth, the treasurer, the superintendent of public instruction, and the commissioner of agriculture, but the first and second auditor of public accounts and the register of the land office are still elected by the legislature.

With reference to the judiciary, the election of judges was still left in the hands of the general assembly, but the new constitution made many changes in the judiciary. Under the Underwood Constitution, every county had its own judge, who held court at least once a month. In addition to the county judges, there were sixteen circuit

judges whose duty it was to hear appeal cases and to have primary jurisdiction in certain civil cases. These circuit judges held court in the several counties of their districts not less than twice a year. Above these courts was the supreme court of appeals to which cases were taken from the lower courts. Under the plea of economy, the county courts were abolished and the circuit courts increased to twenty-four (later by the legislature to thirty).

No county now has court oftener than once in two months (except Norfolk county), while the smaller counties have court only once in three months. The increasing of the number of circuits and of the salaries of the judges has not materially lessened the expense of the judiciary to the State, but the new system has delayed justice in some instances. To illustrate, recently in a small county in Virginia, a landlord, under contract, gave a tenant 30 days' notice to vacate. The tenant resisted, and the landlord proceeded to take steps for ejectment in a justice's court. The decision was in favor of the landlord, whereupon the tenant, under the law, took an appeal to the circuit court, which had been held in that county just a week before. As in that particular county the court met bi-monthly, the trial of this case was postponed 53 days instead of 23. In the meantime, the tenant continued in possession of the house and the landlord was unable to make use of his property as he had anticipated.

In rural districts, the old monthly court was of great service, not only in promoting justice but also in promoting trade of various kinds among the country people. While the latter benefits have been lost in some counties, in others the people have continued to observe court day for social and commercial purposes, the supervisors meeting on that day. Hence we hear in some counties of "supervisors' court" though no real court is held. Fortunately for the cities their courts have not been abolished though an effort was made in the Constitutional Convention to do so. Some efforts were made also to have the judges elected by the people as they had been under the constitution of 1851, but this failed and the judges still are elected by the general assembly. Thus the convention, though its policy was to separate the legislative from the executive and judiciary, by allowing certain executive officers and the election of the judges to remain in the hands of the general assembly, failed in one of its expressed purposes. However, in dealing with the general assembly, the constitutional convention was in a sense antagonistic, and tried in certain ways to tie the hands of that body.

First, the term of the general assembly was cut from 90 to 60 days. Secondly, no measure could be passed unless on its final passage in each house the recorded vote of yeas and nays was an absolute majority of each house, those voting in the affirmative being at least two-fifths of the entire house. In other words, if, in the house of delegates, a measure was on its final passage, the bare majority of 51 being present, the bill would not be passed by a vote of 26, but would require a vote of 40 being two-fifths of the 100 members of the house of delegates. Many restrictions were placed upon the general assembly as to special or private law, chief among which was the prohibiting of it from creating private corporations or amending, renewing or extending the charters thereof, the granting to any private corporation, association or individual any special or exclusive right, privilege or immunity, or naming or changing the name of any private corporation or association. Moreover, the general assembly was forbidden to change the franchise tax of one per centum imposed upon the entire gross receipts of railways and canals until after the year 1913. Many other instances could be mentioned of restrictions not found in the old constitution, but the above suffice to show the point with reference to the powers of the legislature.

Under the old constitution, of particular importance had been the power of the legislature to grant charters, and in many instances this power had been abused, prominent politicians securing lucrative franchises. A corporation commission was established for this purpose, of which more later. The chief features of the new constitution are centered around the suffrage clauses and corporation commission, which two features we desire to discuss briefly.

1. We are told that the first legislative assembly which ever met in America assembled at Jamestown on the thirtieth of July, 1619, that it was composed of 22 delegates elected from the 11 plantations of the colony by the inhabitants thereof. There is no evidence that any restriction whatever was placed upon suffrage (except for the year 1665-1666, when only housekeepers were allowed to vote; but this was repealed and all the free white men over 21 years of age were allowed to vote) until Sir William Berkeley, under instructions from Charles II, had suffrage restricted to freeholders only. This restriction was nominal as no definite amount of land was specified. In 1712, Spotswood in writing to the lords of trade in England complained of the fact that it was very hard to get satisfactory members

of the assembly because any man who owned as much as one-half acre of land had the right to vote, and that the elections were often accompanied by rowdiness. Thereupon, Spotswood was authorized to have suffrage restricted, but it was not until 1736 that a freehold was defined as 50 acres of land unimproved or 25 acres of improved land with a house on it, or a house and lot in a town. This law, with interpretations by the legislature, continued as the suffrage basis of Virginia until 1830 for it was embodied in the Virginia Constitution of 1776, though Jefferson proposed a plan of government which arrived at Williamsburg too late to be considered by that convention, suggesting that all freemen who had paid scot and lot for two years preceding the election should be entitled to vote. It does not seem that the Virginians of 1776 understood the meaning of their famous Declaration of Rights which declared that "All men are by nature equally free and independent," or they undoubtedly believed that no man could give "evidence of permanent common interest with and attachment to the community" unless he owned real estate.

With the growth of western Virginia inhabited by sturdy freemen, the struggle was soon to begin for the extension of suffrage. In the convention of 1829-1830 the western people made a brave fight for free manhood suffrage, but succeeded in getting only a very unsatisfactory compromise which extended suffrage to certain housekeepers, lease holders, tenants, etc. This convention of eminent men succeeded only in fixing suffrage qualifications which the courts of Virginia were not able satisfactorily to interpret. The western people continued their fight for the extension of suffrage and the equalization of representation, which resulted in a new constitutional convention in 1850, which provided for universal free white manhood suffrage without any poll tax or educational qualifications. This principle of suffrage was embodied in the Underwood Constitution, except that it was free manhood suffrage without reference to whites or blacks as provided under the Constitution of the United States and the Reconstruction Acts. Efforts were, however, made to disfranchise a number of whites on account of the part they had taken in the War of Secession. In 1876, the constitution was amended by requiring voters to prepay their capitation taxes. This clause proved to be a great source of bribery, as candidates for office would prepay the capitation taxes of those who would vote for them; hence this provision was struck out by an amendment in

1882, so that for 20 years preceding the new constitution, Virginia had universal manhood suffrage without any restrictions.

Under the Constitution of 1902 the suffrage clauses are more exacting than ever before. First, as to residence, it requires that a man shall reside in the State two years, county, city or town one year and the precinct where he votes 30 days next preceding the election in which he offers to vote. The Underwood Constitution required residence in the State of 12 months; and in county, city or town of three months.

Special registrations were held in 1902 and 1903 at which the following classes were allowed to register:

First, any person who had served in time of war in the army or navy of the United States or the Confederate States or of any State of the United States or of the Confederate States.

Second, the son of any such person.

Third, any person who owns property upon which for the year next preceding that in which he offers to register the States taxes aggregating at least \$1 have been paid.

Fourth, a person able to read any section of this Constitution submitted to him by the officers of the registration and to give a reasonable explanation of the same; or, if unable to read such section, able to understand and give a reasonable explanation thereof when read to him by the registrars.

All who registered under these provisions constitute a permanent roll and no persons having registered under them will have to re-register unless he has changed his residence from the State. Most of the old soldiers registered under the first clause, as they are exempt from the capitation tax, but only a few sons of old soldiers registered under the second clause, preferring to register under the property or the educational clause. Under the first two clauses, very few negroes could register, but under the third clause quite a number of them registered because nearly one-fifth of the farms, though only one-twentieth of the land of Virginia, is owned by negroes. Under the first part of the fourth clause registered most of the young white men of Virginia and some of the negroes who could read and write.

Under the second part of the fourth clause a number registered. This was the only part of the registration in which there could be any discrimination as to race. For example, a registrar might for an illiterate and poor white read to him some simple passage and accept almost any answer as a proper explanation. With

reference to negroes, his conduct could have been different. Many negroes attempted to register under the latter part of the fourth clause, and their statement is that the registrars always read to them the hardest sections so that they would not be able to explain them. We doubt not that there is some truth in this statement though we also know that on a whole the registrations were conducted fairly, and in many country communities a number of negroes were allowed to register under the understanding part of the fourth clause.

It will be recalled that, in Mississippi the constitution provides that the registrars shall in all cases be the judges of a man's qualifications to register. The story is told that a negro professor applied to register. The first question asked him by the board was "What important principle of the *Magna Charta* is embodied in the Constitution of Mississippi?" He is said to have answered: "That no negro shall be allowed to vote in this State," whereupon, the registrars declared that he was qualified to vote.

The Virginians, however, have tried to remove possibilities of fraud in registration, and, consequently, its constitution provided that after the first day of January, 1904, there should be no further registration under any of the clauses we have cited. To become a voter in Virginia, now, a man must simply meet the residence requirements, personally pay all poll taxes assessed or assessable against him for the three years next preceding that in which he offers to register; or if he came of age at such time that no poll tax shall have been assessed against him for the year preceding the year in which he offers to register, he must pay \$1.50 in satisfaction of the first year's poll tax; and he must, unless physically unable fill out the registration blank in his own handwriting without aid, suggestion or memorandum, in the presence of the registration officers, stating therein his name, age, date and place of birth, residence and occupation at the time and for two years next preceding and whether he has previously voted, and if so, the State, county, and precinct in which he voted last.

All voters except veterans of the army or navy of the United States or the Confederate States are required to have personally paid at least six months prior to the election all State poll taxes assessed or assessable against them during the three years next preceding that in which they offer to vote. Moreover, a voter who has registered since the first day of January, 1904, can receive no assistance in preparing his ballot, though all others have the right to receive assist-

ance. The usual restrictions on suffrage as to idiots, insane persons, criminals, etc., are embodied in the constitution.

It is thus seen that the present basis of suffrage is an educational qualification; but no man has to undergo an examination on the constitution, as the test of his educational qualification is his ability to fill out properly the registration blank. This applies to whites and negroes, and as far as we are able to learn, no effort is made by the registrars to mislead any man in registering. It is true that the number of questions which have to be answered in detail on the registration blank does prevent some from registering who are able to write their names.

Under the new constitution, more than one-fourth of the people of Virginia who could have registered under the old constitution are now disqualified. The prepayment of poll tax for the three years next preceding the election at least six months in advance of the election at which a registered voter expects to vote has disfranchised a great number, both whites and blacks.

The census of 1900 shows that the males of voting age of Virginia were 447,815. The report of the auditor of public accounts of Virginia shows that in 1905 the total number paying capitation taxes was 256,656. A number of these capitation taxes, however, were not paid in time to qualify persons paying the same to vote. A number of white men who are registered are careless and fail to remember the requirements of the law with reference to the time of the prepayment of poll taxes. Many negroes do not care to pay their poll taxes unless some one furnishes the money.

The clause requiring voters to personally pay their poll tax has given a good deal of trouble. The question was brought to a test in the case of Tazewell and others vs. Herman, treasurer of the city of Norfolk, in an effort to have the treasurer place upon the list, certified to the clerk of the court, of those qualified to vote on account of prepayment of tax, the names of all persons who had paid their taxes whether directly or indirectly. The case was taken to the supreme court of appeals and there decided on March 17, 1908, that the treasurer must embrace on his list only such persons as have personally paid their taxes. Thus great power is given to the treasurer to say when a man is qualified and how a man has qualified, for the court has not yet decided what *personally paid* means, whether by check or appearing in person. The case has not yet been decided in full, as Attorney-General Anderson has filed in the supreme court of appeals of Virginia a petition for re-hearing.

A very interesting situation prevails as to the poll taxes in the ninth congressional district of Virginia where the republican party is in the majority. It is very generally understood that the leaders of both parties in that district see that many poll taxes are paid, the party managers lending to the voters the money with which to pay their poll taxes, and taking notes to protect themselves from charges of bribery. Rumors are afloat that the same thing is done also in other parts of the State.

It might be observed that the question of legality of the Virginia suffrage laws under the Constitution of the United States has never been sifted. In October, 1903, in the case of Jones and others vs. the Virginia State Board of Canvassers, application was made in the circuit court of the United States for a writ prohibiting the issue of a certificate of election. The plaintiffs in that petition stated that the Constitution tended to disfranchise negroes contrary to the laws of the Constitution of the United States. The matter was taken to the supreme court and dismissed on the grounds of lack of jurisdiction.

II. Probably the most interesting feature of the Constitution of Virginia of 1902 was the creation of a corporation commission of three members appointed by the governor. Its duties are defined in great detail in the constitution; and in general they are: To regulate corporations, that is, all trusts, associations and joint stock companies having any powers or privileges not possessed by individuals, or unlimited partnerships excluding all municipal corporations and public institutions owned or controlled by the State; to create a corporation, extend or amend its charter, the general assembly having no right to interfere whatever, save to pass general corporation laws under certain restrictions. No member of the commission can, at the time that he is a member of said commission, be employed by or hold any office under any corporation, or even be interested in any corporation. In other words, he must not be a stockholder in any company that is incorporated. Under the constitution the commission is to *legislate*, as it were, on passenger and freight rates of all the railroad companies. As a *court*, it hears all cases affecting the violation of the rates, subject, of course, to an appeal to the supreme court of the State. The corporation commission is required by the constitution to see that short hauls shall not be charged at a higher rate than long hauls, thus preventing undue railroad discrimination. As a board of assessors, the commission is required to assess

the value of all railroad property for taxation, the said property to be taxed at the same rates as other property in the State. In addition to this, a franchise tax of 1 per cent on the gross receipts of transportation companies is imposed, and this cannot be modified by the general assembly until after 1913. The constitution also provides that no net income tax shall be assessed against a corporation.

By act of the general assembly, approved April 15, 1907, the spirit of the constitution with reference to the corporation commission was embodied into law. The commission was given all the powers of a court for adjudicating matters relating to corporations, to issue writs, fix fines and penalties, etc.; and its powers to carry out the spirit of the Constitution in legislating as to repairs to railroads, schedules, tariffs of charges, etc., were defined.

The corporation commission secured the names of all the corporations in the State and fixed the value of their property so that taxes might be duly levied. Under this law, for every new charter granted it charges a fee of from \$5 to \$25 according to the amount of capital stock. More than 5000 charters have been issued.

A general franchise tax on all corporations according to their capital stock is levied annually. This tax does not apply, however, to transportation companies which, under the constitution, are taxed 1 per cent on the gross earnings. Under the old laws, corporations were taxed one per cent on their *net* income, which many corporations never reported.

The systematic work of the corporation commission has added immensely to the revenues of the State. The total revenues of Virginia from all sources for 1901 were \$3,633,156; the total revenues from all sources for 1907 were \$5,250,486. Let us illustrate the increase in revenues from the railways. Under the old constitution, a State tax at 30 cents on a \$100 on the road-bed and rolling stock, etc., was \$176,000 in 1901; under the new constitution, at 20 cents on a \$100 it was \$162,313 in 1907, showing that the revenue from the assessed value of the property of railways, etc., is less than it was six years ago. But the franchise tax in 1907, at 1 per cent on the gross receipts of the railroads was \$451,169, while in 1901 the tax on the net income of the railroads of Virginia was only \$29,012. In 1901 the total taxes raised from railroads, though the tax rate was on values even higher than now, amounted to only \$260,000, while in 1907 the total taxes from railroads were \$735,000. In 1901 other corporations

paid no special tax, but in 1907 there was collected from other corporations than the railroads 350,664, thus making from all corporate sources in 1907 the sum of \$1,085,000 as against the sum of \$260,000 in 1901.

The corporation commission has had two very important orders tested by the railroads. In 1903, the commission adopted a set of rules regulating demurrage and other car service charges. The railroads appealed the case to the supreme court of Virginia, which decided that under the constitution, the corporation commission had a right to fix such regulations. These are now in effect and work well, not only for the people but for the railroads themselves.

Exercising its legislative functions, the corporation commission on April 27, 1907, put into effect rules regulating passenger rate charges in Virginia, known as the *two-cent* rate. The railroad companies objected seriously, but by agreement these rates were allowed to go into effect until the matter could be carried through the courts. The railroad companies took the case to the circuit court of the United States. The commonwealth pleaded that the circuit court of the United States had no jurisdiction and could not enjoin a State court, being prohibited by statute of the United States. Judge Pritchard entered decrees against the State, whereupon the attorneys representing the commonwealth carried the case into the supreme court of the United States, which recently rendered an opinion.

First on the plea of the railroad companies that the Virginia States corporation commission was an illegal body, favorable to the State; but secondly on the plea of the railroads that the United States circuit court had a right to enjoin an order of the commission, unfavorable to the State, though it decided that the railroad companies should not have appealed to the United States circuit court until it had first made use of the State court of appeals. It retained the case on its docket until it is seen whether the railroads still have the right of appeal to the state court of appeals, thus holding that the decrees of Judge Pritchard were in error and that the case must first be fought out in the supreme court of Virginia, suit having been prematurely entered in the circuit court of the United States.

As a matter of fact, this decision is a victory for neither the State nor the railroads, though in a sense the railroads have won in that the jurisdiction of the United States circuit court to enjoin the corporation commission has been affirmed. It remains to be seen how the matter may finally be adjusted.

Inasmuch, however, as the decision of the supreme court holds that a single judge of a subordinate court of the United States can enjoin an order entered by the commission, a rule is made humiliating to all the States,—a rule which strikes at the root of our State governments, and their right to regulate intra-State commerce, but which above all is likely to delay justice, for if, as soon as an order is made by the corporation commission, an injunction can be issued by an inferior court of the United States, it may long delay such an order from going into operation.